Supreme Court, U.S.
FILED
DEC 2 - 2016
OFFICE OF THE CLERK

No. 16-605

IN THE
Supreme Court of the United States

TOWN OF CHESTER, NEW YORK

Petitioner,

v.

LAROE ESTATES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

CHARLES W. THOMPSON, JR.
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
51 Monroe Street
Suite 404
Rockville, MD 20850
(202) 466-5424
cthompson@imla.org

SARAH M. SHALF
Counsel of Record
EMORY LAW SCHOOL SUPREME COURT ADVOCACY PROGRAM
1301 Clifton Road
Atlanta, GA 30322
(404) 712-4652
sarah.shalf@emory.edu

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

I. **Allowing Parties to Intervene Without Article III Standing Increases Costs of Litigation Overall** ... 2

A. *The Costs of Inefficient Litigation Ultimately Trickle Down to Taxpayers* 2

B. *Allowing Parties to Intervene Without Article III Standing Removes a Check Against Frivolous Claims* 4

C. *Allowing Parties to Intervene Without Article III Standing Prolongs and Complicates Litigation at the Expense of the Original Litigants* 7

II. **Allowing Parties to Intervene Without Article III Standing Increases Litigation Costs for Municipalities Specifically** 10

CONLUSION 14

TABLE OF AUTHORITIES

Cases

Bethune Plaza, Inc. v. Lumpkin, 863 F.2d 525 (7th Cir. 1988) 9

Keith v. Daley, 764 F.2d 1265 (7th Cir. 1985) 7

Laroe Estates, Inc. v. Town of Chester, 828 F.3d 60, 63 (2d Cir. 2016) 13

New Jersey. v. EPA, 663 F.3d 1279 (D.C. Cir. 2011) (Brown, J., dissenting) 4, 8

Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983) 4

Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1982) 7, 8

Solid Waste Agency v. United States Army Corps of Eng'rs, 101 F.3d 503 (7th Cir. 1996) 11, 12

Idaho v. Freeman, 625 F.2d 886 (9th Cir. 1980) ... 8, 9

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 5

Virginia v. Westinghouse Elec. Corp., 542 F.2d 214 (4th Cir. 1976) 3

Secondary Sources

Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) 11

Amy Gardner, *An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenors*, 69 U. CHI. L. REV. 701 (2002)..... 8

Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415 (1991)..... 5, 9, 11

Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279 (1990)..... 8, 10, 11

Kenneth E. Scott, *Standing in the Supreme Court A Functional Analysis*, 86 HARV. L. REV. 645 (1973) 7

Kevin Hallstrom, *Standing Down: The Negative Consequences of Expanding Hawaii's Doctrine of Standing*. 30 U. HAW. L. REV. 475 (2007) 5, 6

Peter A. Appell, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L. Q. 215 (2000) 10

Robert Hockett, *Paying Paul and Robbing No One: An Eminent Domain Solution for Underwater Mortgage Debt*, 19 CURRENT ISSUES IN ECON. FIN., no. 5, 2013..... 12

Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982) 4

Other Authorities

Denise Cardman, *Federal Court Funding* (2016), http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/federal-court-funding.html 2

Mike Maciag, *From Police Shootings to Playground Injuries, Lawsuits Drain Cities' Budgets*, Governing the States and Localities (November 2016), http://www.governing.com/topics/finance/govgovernment-lawsuits-settlements.html 12

Peter Dreier, *To Rescue Local Economies, Cities Seize Underwater Mortgages Through Eminent Domain*, The Nation (July 12, 2013), https://www.thenation.com/article/rescue-local-economies-cities-seize-underwater-mortgages-through-eminent-domain/ 12

Richard L. Revesz and Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* (2008) 4, 5

United States Courts, *FY 2016 Funding Meets Judiciary Needs*, (December 15, 2015)

http://www.uscourts.gov/news/2015/12/21/fy-2016-funding-meets-judiciary-needs. 3

Rules

FED. R. CIV. P. 24 .....passim

SUP. CT. R. 37.2..... 1

SUP. CT. R. 37.6 1

INTERESTS OF THE *AMICUS CURIAE*[1]

Amicus is the International Municipal Lawyers Association, a non-profit, nonpartisan professional organization dedicated to advancing the interests and education of local government lawyers. IMLA's membership consist of more than 2,500 cities, counties, state municipal leagues and individual attorneys representing governmental interests. *Amicus* has no personal stake in the outcome of this case, but has an interest in seeing that litigation involving municipalities is economically efficient and does not unnecessarily burden local governments' limited resources.

---

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae affirms that no counsel for party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief and no person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.2, the Respondents and the Petitioners received at least 10-days' notice of the intent to file this brief under the Rule, each party has consented to the filing of this brief, and copies of the consents are on file with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Second Circuit's ruling allowing Laroe Estates, Inc. to intervene under Rule 24 without first showing Article III standing sets a dangerous precedent that allows parties without a direct stake in the outcome of a case to prolong and complicate litigation, resulting in increased costs to the federal court system, and thus ultimately to taxpayers. The consequences are even more serious in cases involving municipalities, as the cost of intervention also comes at the expense of taxpayers, forcing cash-strapped municipalities to spend scarce resources on defending frivolous litigation in lieu of providing that funding for necessary government services like schools, roads, police and fire services, etc. *Amicus* urges the Court to grant certiorari in order to reverse the Second Circuit's decision.

ARGUMENT

I. Allowing Parties to Intervene Without Article III Standing Increases Costs of Litigation Overall

A. The Costs of Inefficient Litigation Ultimately Trickle Down to Taxpayers.

The court system has become increasingly expensive, with the burden placed on taxpayers. Denise Cardman, *Federal Court Funding* (2016), http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_judiciary/federal-court-funding.html. Taxpayer

dollars fund the majority of the federal judicial system. *Id.* These costs are significant. Congress appropriated $6.78 billion in discretionary funding for the federal Judiciary for the 2016 year, with the majority going to the operating costs of the courts. United States Courts, *FY 2016 Funding Meets Judiciary Needs*, (December 15, 2015) http://www.uscourts.gov/news/2015/12/21/fy-2016-funding-meets-judiciary-needs.

An increase in the length or complexity of litigation will require additional court resources, a cost that ultimately falls to taxpayers. *Id.* As an initial matter, then, any policy that allows additional parties to intervene and insert frivolous claims or to prolong or complicate litigation will increase costs for taxpayers, even when governing bodies are not a party to suit.

As the Fourth Circuit has explained, "[w]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented." *Virginia v. Westinghouse Elec. Corp.*, 542 F. 2d 214, 216 (1976). At best, then, an intervenor who would not have standing to bring suit themselves is merely redundant, and not without a cost, as the "resultant complexity of the litigation, combined with increases in cost and judicial time, would hinder resolution of the present conflict." *Id.* at 217. Worse, the claim is not sufficient to support a separate suit, and would not have been brought in the absence of the original litigation. The chances that allowing an intervenor

will impose additional costs on the judicial system as a whole are therefore significant.

B. Allowing parties to intervene without Article III standing removes a check against frivolous claims

Under the American Rule, a petitioner must bear all costs associated with bringing a suit. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682–84 (1983). This system forces litigants to make economically efficient decisions, such that a "rational plaintiff will bring suit if and only if the expected judgment would be at least as large as his expected legal costs, i.e. the total legal costs discounted by his probability of losing at trial." *New Jersey. v. EPA*, 663 F.3d 1279, 1288 (D.C. Cir. 2011) (Brown, J., dissenting); *see also* Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 58 (1982). This calculus, however, applies primarily to the original plaintiffs to a suit. In contrast, "intervenors bear far fewer costs, and thus shoulder far less risk, than petitioners," meaning that "a party with a marginal claim would be substantially more likely to intervene than it would be to file suit in its own right." *New Jersey*, 663 F.3d at 1288.

If intervenors are not forced to internalize the full costs of bringing suit, it encourages them "to pile on claims that are not sufficiently meritorious to justify filing in their own right." *See* Richard L. Revesz and Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the*

Environment and Our Health 12 (2008) ("[W]e need a mechanism that tells us when to stop spending money. Cost-benefit analysis is that mechanism."). This creates an incentive structure at odds with the original parties to suit, as will be discussed below, and further, a threat to economic efficiency. Absent a pressing economic cost-benefit analysis at the onset of litigation that limits petitioners from initiating marginal claims, judges have had to turn to other methods to curtail excessive intervention.

Judges have found standing as a useful safeguard in managing the "litigation explosion" caused by the 1966 amendments to the Rules of Civil Procedure, which relaxed party joinder requirements. Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 439 (1991). It is also a particularly useful tool against potential public-interest intervenors, who often bring actions against government entities and municipalities. These intervenors are likely to lack Article III standing because their interests are "relatively intangible, abstract, [and] ideological," as compared to the concrete interests of the petitioner who initiated the suit. *Id.* at 419; *see, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Hawaii provides a good example of what can happen if standing requirements are relaxed. In recent years, Hawaii's state courts have demonstrated a "willingness to depart from the federal approach and broaden standing," particularly for cases involving public-policy questions. Kevin Hallstrom, *Standing Down: The Negative Consequences of Expanding Hawaii's Doctrine of*

Standing, 30 U. HAW. L. REV. 475, 475 (2007). This development undermines the original goal of standing requirements in promoting judicial restraint, and "open[s] up the metaphorical floodgates" for frivolous lawsuits that negatively impact the economy. *Id.* at 493. The Article cautions that "lowering the barriers to justice provides greater opportunity for judicial activism," forcing the court to deal with "hundreds of issues previously left only to the legislature." *Id.* at 492 ("If the [plaintiffs] can point to the perceived harm of sea animals or the disruption of surfing spots to establish standing, any group should be able to assert a specific interest in some environmental or aesthetic harm caused by another party").

This concern is compounded for situations involving intervenors, who face even less costs in attaching their claims to existing litigation, forcing courts to adjudicate and parties to litigate issues that could not support a suit in their own right. The additional costs of allowing intervenors in these cases, then, falls heavily on governing bodies and their taxpayers. As one Ninth Circuit Judge noted:

> [T]he district court must retain flexibility when ruling on intervention applications. This is particularly true in complex public interest litigation which typically involves multiple parties and issues and often attracts multiple applications for intervention. If the trial is not to become unmanageable, the district court must have some discretion to limit the issues on which or the stages during which a party may intervene.

See Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 531 (9th Cir. 1983) (Wallace, J., dissenting).

C. Allowing parties to intervene without Article III standing prolongs and complicates litigation at the expense of the original litigants

Litigation can be a lengthy process and potential plaintiffs must acknowledge from the onset that there may be a long period between bringing a claim and ultimate resolution and relief. While litigants await court decisions, attorneys' fees accrue and the opportunity for relief and resolution is delayed.[2] Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 673 (1973) (noting the opportunity costs of litigation provide the court system with a functional "initial screening barrier"). As discussed above, intervening parties do not face these same obstacles as plaintiffs and defendants, since they become attached to a legitimate case already in progress. This "skews the calculus [of whether to file a claim] even further by allowing an intervenor to hitch its completely

---

[2] These costs are not always monetary. For example, in *Keith v. Daley*, 764 F.2d 1265 (7th Cir. 1985), a pro-life organization sought to intervene in a suit brought by a group of physicians who challenged the constitutionality of a law that prevented them from performing abortions. While intervention was denied for reasons not implicating Article III standing, a delay in the resolution of the case would surely have imposed costs well beyond attorney's fees.

unrelated claim to a promising [claim]." *New Jersey v. EPA*, 663 F.3d 1279, 1288 (D.C. Cir. 2011) (Brown, J., dissenting).

Intervenors therefore reap the benefit of their role in extending litigation while imposing the costs of delay disproportionately on the original litigants. The original litigants may not have anticipated an intervention in deciding to pursue litigation in the first place, and their cost-benefit calculus is distorted post-hoc as they endure delays in the resolution of their case while courts occupy themselves with new issues raised by intervenors. *See* Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279, 299 (1990) ("Intervention threatens control because intervenors will usually introduce new evidence, new issues, and new positions on existing issues. . . . New parties always bring with them new costs, and intervention may so strain resources that the original parties cannot afford to maintain the suit.") This is an equal concern for plaintiffs and defendants in a case, but is particularly salient in cases surrounding public-policy controversies involving governmental bodies. There, the two sides may simply want their controversy resolved in earnest, but must worry about "their case being taken over by intervenors who present themselves as concerned citizens or public interest organization." Amy Gardner, *An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenors*, 69 U. CHI. L. REV. 701, 702 (2002); *see, e.g.*, *Sagebrush Rebellion, Inc. v Watt*, 713 F.2d 525 (9th Cir. 1982) (wildlife group intervening to protect bird habitats); *Idaho v*

Freeman, 625 F.2d 886 (9th Cir. 1980) (women's rights group seeking to intervene in case pertaining to Equal Rights Amendment).

It is not surprising, then, that judges have utilized standing requirements as "an efficacious basis for excluding intervention applicants that would expand the number of litigants in a lawsuit" amid "increasingly unwieldy party structure of cases." Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 440 (1991). As the Seventh Circuit has observed:

> [W]hen the extra litigant may block settlement or receive an award of attorneys' fees, it is not simply along for the ride. An intervenor is not an *amicus curiae*, even a "litigating" *amicus curiae* (one that introduces evidence at trial). The intervenor seeks control of the suit, acquires a right to conduct the case in a way that may undermine the interests of the original plaintiff (this may, indeed, be the intervenor's principal objective, if the intervenor contends that it has interests adverse to that party), and may become eligible for a separate grant of relief or an award of attorneys' fees. It is hard to treat a party such as the Council as a fifth wheel.

Bethune Plaza, Inc. v. Lumpkin, 863 F.2d 525, 531 (7th Cir. 1988). It seems incongruous that intervenors be granted full rights to control a suit without requiring the same level of interest and stake in the outcome as is required of the original parties.

II. Allowing Parties to Intervene Without Article III Standing Increases Litigation Costs for Municipalities Specifically

Some have suggested that a flexibility encouraging parties to intervene facilitates economic efficiency by allowing a single case to incorporate multiple claims, precluding "duplicative suits" and "inconsistent and conflicting decrees." Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHICAGO L. REV. 279, 302 (1990). However, this would only apply to claims and claimants that have sufficient standing to bring an independent suit. For all the reasons stated above, intervenors raise costs, an issue of particular concern for government litigants.

While there is scarce available literature empirically demonstrating the actual costs that intervening parties add to suits against municipalities (and particularly those outside parties who would not be able to show Article III standing if it was required), there is ample literature on the immense costs of litigation overall on municipalities' budgets.

The number and complexity of cases involving municipalities and governmental bodies has risen in the past four decades, largely in part to the 1966 amendments to the joinder rules, which gave rise to what became known as "public law litigation." Peter A. Appell, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L. Q. 215, 215 (2000). In his seminal Harvard Law Review article that coined the term, Abram Chayes described such

litigation as revolving around a "grievance about the operation of public policy"—most often governmental policy, but frequently the policy of nongovernmental aggregates that affect numerous individuals and entities. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976).

The new rules facilitating intervention and the large pool of potential parties to draw on increased the size and frequency of lawsuits that municipalities were forced to defend against. *See* Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279 (1990). These suits, further, are particularly expensive to litigate as they "involve sprawling party structures, an emphasis on legislative fact-finding, prospective relief, ongoing decrees that affect widespread interests, and active involvement by judges." *Id.* at 280. A number of academics have argued that judges use a balancing test on a case-by-case basis to weigh the added benefits to the public that additional parties bring against the imposition they bring to the case in public-interest situations. *See, e.g.,* Carl Tobias, *Standing to Intervene*, 1991 Wis. L. Rev. 415, 439 (1991). There is no doubt however, that reduced barriers to entry in public-interest cases can attract ideologically driven intervenors who would raise costs for the original litigants not only by "making the litigation more cumbersome but also (and more important) by blocking settlement." *Solid Waste Agency v. United States Army Corps of Eng'rs,* 101 F.3d 503, 507 (7th Cir. 1996).

The risk of prolonged or convoluted litigation weighs more heavily on smaller municipalities relative to larger cities. For example, New York City was able to reduce its overall litigation costs after it began cost-mitigation policy that encouraged easy settlements to make frivolous lawsuits disappear, rather than going to court to get them dismissed. Mike Maciag, From Police Shootings to Playground Injuries, Lawsuits Drain Cities' Budgets, Governing the States and Localities (November 2016), http://www.governing.com/topics/finance/govgovernment-lawsuits-settlements.html. Smaller municipalities, like the petitioner in this case, cannot utilize similar strategies that require larger economies of scale.

An efficient framework for lawsuit resolution is integral for smaller municipalities in the context of eminent domain, which has been employed by some cities as a method of recovery from financial disasters like the Great Recession. *See* Robert Hockett, *Paying Paul and Robbing No One: An Eminent Domain Solution for Underwater Mortgage Debt*, 19 Current Issues in Econ. Fin., no. 5, 2013, at 1. Cities, like Richmond, California, use eminent domain to overcome pooled-mortgage contacts and force mortgage refinancing for underwater properties. Peter Dreier, *To Rescue Local Economies, Cities Seize Underwater Mortgages Through Eminent Domain*, The Nation (July 12, 2013), https://www.thenation.com/article/rescue-local-economies-cities-seize-underwater-mortgages-through-eminent-domain/. However, litigation can complicate and delay these efforts to use government

power to mitigate costs, an issue exacerbated by intervention. While this particular case does not appear to involve an attempt by Town of Chester to use eminent domain for these purposes, it is nonetheless illustrative of how intervening parties in other scenarios could impede on efforts to use litigation to resolve a pending matter that is weighing on the municipality and its citizens.

The controversy in question began when Laroe Estates, Inc., the respondent to this appeal and an intervenor to the original case, entered a purchase agreement with the deceased original plaintiff, Steven Sherman. *Laroe Estates, Inc. v. Town of Chester*, 828 F.3d 60, 63 (2d Cir. 2016). The parties signed the agreement in 2003, when many homeowners purchased homes at prices above post-Recession values. *Id.* Now, over a decade later, the circumstances have changed significantly, but resolution for the actual parties is nowhere in sight. The current plaintiff (Sherman's widow) has asserted that she lacks an "incentive to move the case forward" and is "unwilling to pursue the claim" herself. *Laroe*, 828 F.3d at 67. However, in allowing Laroe to intervene, the court has further prolonged a case that has already lasted for eight years since the date of filing, and sixteen years since the original plaintiff applied for subdivision approval. *Id.* (emphasis added).

The circumstances today are nothing like those the parties anticipated when litigation began. The Town of Chester continues to bear the cost of a lawsuit that the original plaintiff no longer wants to continue and

for which the intervenor has no cognizable interest. In the interest of efficiency, such situations should be prevented by requiring intervenors to demonstrate Article III standing.

CONCLUSION

For the foregoing reasons, amicus respectfully asks this Court to grant the Petition for Writ of Certiorari and reverse the decision of the Second Circuit.

Respectfully submitted,

CHARLES W. THOMPSON, JR.
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
51 Monroe Street, Suite 404
Rockville, MD 20850
(202) 466-5424
cthompson@imla.org

SARAH M. SHALF
Counsel of Record
EMORY LAW SCHOOL SUPREME COURT ADVOCACY PROGRAM
1301 Clifton Road
Atlanta, GA 30322
(404) 712-4652
sarah.shalf@emory.edu

December 2, 2016